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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHELLE YING HO JARUKARUTA, Defendant and Appellant.	E053906 (Super.Ct.No. RIF10003161) OPINION

APPEAL from the Superior Court of Riverside County. Harry A. Staley, Judge. (Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Teresa Torreblanca, and Marissa A. Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michelle Ying Ho Jarukaruta appeals after she was convicted of first degree burglary and receiving stolen property. She contends that the trial court should have instructed on second degree burglary, and that the addition of the receiving stolen property charge was improper and presumptively retaliatory, because it was alleged only after a mistrial and defendant's rejection of a plea offer. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In August of 2010, Marc Whinnem, the victim, was transitioning his residence from one location, in Riverside, to another, in Corona. Over the course of a few days, he took some boxes and other property to the new Corona residence. He even spent the night in the new residence once or twice. On the morning of August 4, while the victim was at work, he received a call from the police that the new residence had been broken into. When the victim arrived, he saw that the front door had been kicked in. A number of electronics items had been taken, including his new television set, some video game consoles, video games, and DVD's. The missing property was estimated at $5,000 to $6,000 in value.

On the date of the theft, law enforcement officers were conducting a surveillance of a light green car. An undercover officer, Marc King, saw the light green car parked on a cul-de-sac near the victim's Corona residence. The car was parked with the back end toward the cul-de-sac, and the front toward the open end of the street. As the undercover officer passed the light green car in his unmarked vehicle, he saw a woman lying in the

driver's seat; the driver's seat was fully reclined. Because he did not want to draw the attention of the people he had under surveillance, the undercover officer drove past the cul-de-sac to a nearby side street, and parked.

While he was stopped on the side street, out of view of the light green target car, the surveillance was monitored by other officers in an airplane. The flight deputy reported by radio to the undercover officer on the ground. The flight deputy saw the light green car back into the driveway of the victim's residence. He saw a woman get out of the car, as two men came out the front door of the house. One of the men carried a large television set, and the other carried some boxes or bags. The woman opened one of the car doors, and the man with the television placed it into the back seat. The other man placed the boxes or bags into the trunk. The two men got into the front seats of the car, while the woman got into the back seat. The light green car left the scene and headed toward the freeway. All this information was relayed to units on the ground.

The undercover officer returned to the cul-de-sac to verify whether a crime had occurred. He passed the light green car as it left the area. He saw two men in the front seats; the woman he had seen earlier was no longer in the driver's seat. The undercover officer saw that the front door of the house had been broken in. He contacted a neighbor to locate the resident of the house. He then contacted the victim and informed the victim of the theft.

Meanwhile, another deputy followed the light green target car until he effected a law enforcement stop. One woman and two men were removed from the target car and

arrested. The woman was later identified as defendant, Michelle Jarukaruta. Law enforcement officers recovered a television set, video game consoles, and video games from the light green car driven by the thieves. This property was returned to the victim. Officers also found a small pry bar in the trunk, which was taken into evidence.

As a result, defendant was charged by information with first degree burglary (Pen. Code, § 459). After a mistrial, the prosecution amended the information to allege both the first degree burglary charge and one count of receiving stolen property (Pen. Code, § 496, subd. (a)). After a second trial, the jury convicted defendant on both counts. The court suspended imposition of the sentence and placed defendant on probation.

Defendant now appeals, arguing that the court erred in denying defendant's request for a second degree burglary instruction, and that the receiving stolen property charge should be reversed because its addition after the first trial violated principles against vindictive prosecution.

ANALYSIS

I. The Trial Court Properly Denied Defendant's Request for an Instruction on Second Degree Burglary

At the close of evidence in the case, defense counsel requested an instruction on second degree burglary. One of the investigating officers had indicated that the house was in a state of disarray, as if someone were moving in or moving out of the house. Counsel argued that the officer's testimony alone "should provide enough for the jury to reasonably determine whether or not the house was, in fact, inhabited."

The trial court denied the instruction request. The court relied on some cases (see *People v. Hughes* (2002) 27 Cal.4th 287; *People v. Hernandez* (1992) 9 Cal.App.4th 438, 441 [Fourth Dist., Div. Two]) for the proposition that, whether someone was sleeping in a residence was not determinative of its status as an inhabited dwelling. In any event, the court found that the victim had testified that he had spent some nights sleeping at the new house, there was furniture in the secondary rooms of the home (though he had not yet moved in the master bedroom furniture), he was receiving mail at both addresses, and there was a refrigerator with food at the house, because he and his wife "were staying at both places." The court concluded that the "only possible finding is that this could have been a residential burglary, that there was no finding this could have been a burglary of a non dwelling."

Defendant urges that the trial court's ruling was in error, and that the trial court improperly took the issue from the jury.

A. *Standard of Review*

As to the standard of review, defendant contends that, when a court decides not to give an instruction on a lesser included offense, the question is reviewed de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 730, 733.) In *People v. Cook* (2006) 39 Cal.4th 566, at page 596, the California Supreme Court articulated a similar standard: "We independently review a trial court's failure to instruct on a lesser included offense. [Citation.]" The court went on to explain: "The [trial] court must, on its own initiative, instruct the jury on lesser included offenses when there is substantial evidence raising a

question as to whether all the elements of a charged offense are present [citations], and when there is substantial evidence that the defendant committed the lesser included offense, which, if accepted by the trier of fact, would exculpate the defendant from guilt of the greater offense. [Citation.]" (*Ibid.*)

Whether an offense qualifies as a lesser included offense, under either the elements test or the accusatory pleading test (see *People v. Moon* (2005) 37 Cal.4th 1, 25-26; *People v. Lopez* (1998) 19 Cal.4th 282, 287-288), is a question of law, which may be determined by the reviewing court independently. Note, however, that the trial court's duty to instruct (either sua sponte or on request) is triggered by the existence of *substantial evidence* to support the theory that the defendant might be guilty of the lesser included offense, and not guilty of the greater. The duty to instruct on a lesser included offense does not arise unless substantial evidence supports a conclusion that the defendant is guilty *only* of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Review of the issue thus requires both an assessment of the state of the evidence at trial, and an analysis of that evidence against the legal requirements (elements test, or pleading test) of the lesser included offense. That is not to say that we apply a deferential "substantial evidence" test; we do not. Rather, both the trial and appellate courts are presented with a legal question: whether the facts (evidence presented at trial), which are potentially available to support a lesser included offense, are sufficient, if believed by the trier of fact, to meet the elements of that offense.

B. *There Was No Substantial Evidence to Support Finding Defendant Guilty of the Lesser Offense, But Not the Greater*

Penal Code section 459 provides that a person who enters any building or vehicle, as specified in the section, with intent to commit theft or any felony therein is guilty of burglary. Penal Code section 460 distinguishes the degrees of burglary: "(a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree. [¶] (b) All other kinds of burglary are of the second degree. . . ." Penal Code section 459 defines the term "inhabited" as "currently being used for dwelling purposes, whether occupied or not. . . ."

The evidence presented at trial on the critical issue—whether the house that defendant participated in burglarizing was an "inhabited dwelling house,"—came from the victim. The victim testified that he was living at both the old residence and the new one. He had moved in some furniture and electronics, but not all. He received mail at both locations. He had a working refrigerator with food at both locations. He had stayed overnight once or twice, although he did not do so on the night immediately preceding the burglary.

Under Penal Code sections 459 and 460, in determining whether a structure is an "inhabited dwelling house," the """proper question is whether the nature of a structure's

composition is such that a reasonable person would expect some protection from unauthorized intrusion.'"" (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 318 [Fourth Dist., Div. Two].) A structure "'need not be the victim's regular or primary living quarters' in order to be deemed an inhabited dwelling house." (*Ibid.*) Rather, the inhabited/uninhabited dichotomy turns on the character of the use of the building. "A structure is a dwelling if it is ordinarily used for residential purposes. It is 'inhabited' if it is currently being used for residential purposes, even if it is temporarily *unoccupied*, i.e., no person is currently present. A formerly inhabited dwelling becomes uninhabited only when its occupants have moved out permanently and do not intend to return to continue or to resume using the structure as a dwelling." (*Id.* at p. 320.)

All the evidence admitted at trial was consistent with the home's use for residential purposes. One of the officers testified that the front door of the house appeared to be kicked in, with splintered wood and paint chips indicating a forcible entry. It was difficult to tell initially if there had been a burglary, because "The place was a little disheveled," and it "looked like the people were either moving in or moving out." Nothing in this testimony contradicted the victim's evidence that he and his wife were in the process of moving into the house as their new residence. The key criteria for determining whether a house should be deemed an "inhabited dwelling house" are related to the use of the property for residential purposes. On this point, the evidence was uncontradicted that the house was being used for residential purposes. The victim had moved some, including some of his most valuable, possessions into the house. He had

placed a refrigerator for food storage, which would entail establishing utility service at the house. He stopped there every day to bring more items. He and his wife intended to return and to occupy the premises for purposes such as storing personal belongings, eating, dressing, bathing, sleeping, and other intimate, personal activities for which an occupant reasonably expects freedom from intrusion. (See *People v. Villalobos*, *supra*, 145 Cal.App.4th 310, 318.)

The evidence was wholly uncontradicted that the house was currently being used for residential purposes. There was simply no evidence in this case from which a trier of fact could have reasonably concluded that the victim had permanently abandoned the purpose of residing in the home. There was no evidence which would support the view that defendant was guilty of only the lesser offense, and not the greater. The trial court properly denied defendant's request for an instruction on the lesser included offense of second degree burglary.

II. Reversal of the Receiving Stolen Property Charge Is Not Required for Alleged Vindictive Prosecution

Defendant next contends that the court should reverse her conviction for receiving stolen property on the ground of vindictive prosecution. Defendant was initially charged with and tried for burglary, but that proceeding resulted in a mistrial. Defendant was then offered a plea bargain (probation and 180 days in jail), which she refused. At some time after the mistrial, the prosecutor filed an amended information alleging charges both of

burglary and of receiving stolen property. After a second jury trial, defendant was convicted on both counts.

Defendant now argues that the amendment of the information to add a receiving stolen property charge was improper, and presumptively vindictive, to punish her for refusing the plea offer and exercising her right to a jury trial.

The People urge that defendant forfeited the right to raise the issue on appeal.

Preliminarily, the People argue that the record does not clearly specify when the amended information was filed in relation to the plea bargain offer which defendant refused—in other words, that it is not clear that the information was amended only after defendant refused a plea offer. The amended information was filed March 25, 2011, and the case was assigned for the second trial only three days later, on March 28, 2011. In the People's sentencing brief, the prosecutor wrote that, "Despite being offered probation and 180 days county jail by the People and being advised by three separate judges that the offer was more than reasonable, the defendant decided that she wanted a re-trial. She was re-tried in March of 2011 . . . ." This statement fairly gives rise to an inference that the second trial, and the amended information filed three days earlier, were resorted to only after defendant refused the plea offer.

The People also argue, however, that defendant failed to preserve the issue for appeal by failing to make a clear objection on the ground of vindictive prosecution below. "'[B]ecause a claim of discriminatory prosecution generally rests upon evidence completely extraneous to the specific facts of the charged offense, we believe the issue

should not be resolved upon evidence submitted at trial, but instead should be raised . . . through a pretrial motion to dismiss.' [Citation.] This rationale applies to claims of vindictive prosecution. (See also *People v. Toro* (1989) 47 Cal.3d 966, 976 [defendant must object to amendment of information at trial to preserve a lack-of-notice objection] . . . .)." (*People v. Edwards* (1991) 54 Cal.3d 787, 827.)

Defendant responds that she did object to the amendment at a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118). She did raise the question, "since the D.A. they added a new charge, is that -- are they supposed to add a new charge like second to the trial?" The court responded, "They, in theory, can add charges. There may be some limitation on it. Actually, in your case, it may arguably benefit you, because it looks like it would be an alternative charge, and it's a less serious charge than the one that you are currently facing. But you could discuss that with your attorney." So far as the record shows, the issue was never mentioned again.

The People point out that this discussion took place at a confidential hearing from which the prosecution was excluded. If a defendant demonstrates facts sufficient to raise a presumption of vindictive prosecution, then the burden shifts to the prosecutor to rebut the presumption. (*Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 374.) There was no opportunity for the prosecutor to address any issue of vindictive prosecution here, and otherwise to justify the addition of the receiving stolen property charge, because it was raised only at the closed hearing. In any case, defendant's question was tentative, and she never clearly moved to dismiss the added charges; she was referred to her attorney, and

thereafter nothing was said about the amended information. For this reason, the issue was not properly preserved for appeal.

We also reject the contention on the merits. "'Where the defendant shows that the prosecution has increased the charges in apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness. [Citation.]' [Citation.]" (*People v. Valli* (2010) 187 Cal.App.4th 786, 803.) The presumption of vindictiveness applies not only to a new trial after a successful appeal, but also to a retrial after a mistrial. (*Twiggs v. Superior Court*, *supra*, 34 Cal.3d 360, 363-364; see also *In re Bower* (1985) 38 Cal.3d 865, 873-880.) However, "'[t]he central notion underlying the rule of those cases is that a person who has suffered a conviction should be free to exercise his right to appeal, or seek a trial de novo, without apprehension that the state will retaliate by "upping the ante" with more serious charges or a potentially greater sentence.'" (*People v. Puentes* (2010) 190 Cal.App.4th 1480, 1484, quoting *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1543.)

The amendment here did not "up the ante" with more serious charges or a potentially greater sentence. The charge of receiving stolen property was, as the trial court pointed out, a less serious charge than the first degree burglary charged in count 1. The jury could have treated the receiving stolen property as an alternative to the burglary charge, but, even if defendant were (as she was) convicted of both (*People v. Allen* (1999) 21 Cal.4th 846, 862-863 [a defendant may be convicted of both burglary and receipt of property stolen in the process of committing the burglary, because a conviction

for burglary is not a conviction for stealing or taking property]), under Penal Code section 654 she could not be punished for both (*People v. Landis* (1996) 51 Cal.App.4th 1247, 1255). Defendant thus failed to demonstrate conditions giving rise to a presumption of vindictive prosecution.

Defendant further argues, however, that it was not necessary to raise a presumption of vindictiveness, or to permit the prosecutor to rebut such a presumption, because there was evidence of actual vindictiveness on the record. That is, the sentencing probation report recommended placing defendant on probation, with the condition that she serve 180 days in the county jail. This recommendation was similar to the plea offer that the prosecution made before the second trial. At the sentencing hearing, the prosecutor stated, "If the Court recalls, the People were offering pretty much exactly what the probation office now thinks of as an appropriate sentence. So I think what probation has recommended is significantly lower than what the defendant should receive, now that she's gone to trial and has not admitted responsibility at an early stage . . . ." Defense counsel objected at the time that the People's remarks represented a request that "somehow the Court should punish her for having that trial and exerting [her constitutional] rights . . . ." The prosecutor responded, "I do not think I suggested punishing the defendant for going to trial. I think I phrased my suggestion appropriately, and 180 days was in consideration for early disposition."

Defendant seizes solely on the phrase, "now that she's gone to trial," to argue that the prosecutor effectively admitted he was seeking greater than the recommended

sentence because defendant exercised her right to go to trial. However, defendant conveniently omits the words immediately following, i.e., "and has not admitted responsibility at an early stage." Whether a defendant has "voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process," is a valid consideration in mitigation under the determinate sentencing law (see Cal. Rules of Court, rule 4.423(b)(3)), and may well be considered by the prosecutor in offering a plea bargain. (Cf. *People v. Feyrer* (2010) 48 Cal.4th 426, 432.)

On the other hand, "[w]hether a defendant is remorseful is a proper consideration with respect to probation. (Rule 414(d)(9) [*sic*; see now, Cal. Rules of Court, rule 4.414(b)(7)].) [The defendant] asserts that this factor was inapplicable to him because he did not admit that he had committed the offenses and the evidence was not overwhelming. 'Lack of remorse may be used as a factor to aggravate under California Rules of Court, rule 408 [see now, rule 4.408] unless the defendant has denied guilt *and* the evidence of guilt is conflicting.' [Citation.]" (*People v. Leung* (1992) 5 Cal.App.4th 482, 507.) Here, defendant did continue to maintain her innocence, but the evidence of her guilt was overwhelming. When she was interviewed by the probation department, defendant stated that she had met her two codefendants at a friend's house in Ontario, and asked them for a ride to her home in Los Angeles, because they lived near her home. Defendant claimed that she paid no attention that the codefendants drove in the opposite direction from Los Angeles, parked in the cul-de-sac, and thought nothing of their going into the victim's house. She claimed no knowledge of their purpose when they called her

mobile phone and asked her to back the car into the driveway, nor when they proceeded to load the electronics equipment into the car. The level of defendant's asserted obtuseness or obliviousness simply defies belief. Lack of remorse may indicate a defendant's lack of suitability for parole (see *In re Jackson* (2011) 193 Cal.App.4th 1376, 1389) or probation (*People v. Leung*, *supra*, 5 Cal.App.4th 482, 507).

Here, there was no showing of vindictive prosecution; defendant's conviction of receiving stolen property was proper.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.